

SENATE BILL 395

By Gresham

AN ACT to amend Tennessee Code Annotated, Title 49,  
Chapter 1, relative to the "Empowerment  
Scholarship Account Act."

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Title 49, Chapter 1, is amended by adding the following language as a new part:

**49-1-1201.** This part shall be known and may be cited as the "Empowerment Scholarship Account Act."

**49-1-1202.** As used in this part, unless the context otherwise requires:

(1) "Curriculum" means a complete course of study for a particular content area or grade level, including any supplemental materials required by the curriculum as approved by the state board of education;

(2) "Department" means the department of education;

(3) "Eligible postsecondary institution" means a community college, a university in the University of Tennessee system or the board of regents system, a state public university, or an accredited private postsecondary institution;

(4) "Eligible student" means a student who:

(A) Was previously enrolled in a Tennessee public school during the two (2) semesters immediately preceding the semester for which the student receives an empowerment scholarship account;

(B) Is eligible to enroll in a Tennessee public school for the first time; or

(C) Received an empowerment scholarship account pursuant to this part in the previous school year;

- (5) "ESA" means an empowerment scholarship account;
- (6) "LEA" means the local education agency;
- (7) "Parent" means the parent, legal guardian, person who has custody of the child, or person designated as caregiver with power of attorney for care of a minor child pursuant to title 34, chapter 6, part 3;
- (8) "Participating school" means a nonpublic school that meets the requirements established in this part and seeks to enroll eligible students;
- (9) "Participating student" means an eligible student whose parent is participating in the empowerment scholarship account program;
- (10) "Program" means the empowerment scholarship account program created in this part; and
- (11) "Provider" means a participating school, person, or entity that offers educational services to one or more participating students under this act.

**49-1-1203.**

(a) A parent of an eligible student shall qualify to participate in the program if the parent signs an agreement promising:

(1) To provide an education for the participating student in, at a minimum, the subjects of reading, grammar, mathematics, social studies, and science; and

(2) Not to enroll the parent's eligible student in a public school and to release the LEA in which the student resides and is zoned to attend from all obligations to educate the student.

(b) Parents of students participating in the program must agree to only use the funds deposited in a participating student's ESA for the following expenses:

- (1) Tuition and fees at a participating school;
- (2) Textbooks required by a participating school;

(3) Tutoring services provided by a tutor or tutoring facility accredited by a state, regional, or national accrediting organization or by an individual licensed to teach in Tennessee public schools pursuant to chapter 5 of this title;

(4) Payment for purchase of curriculum;

(5) Fees for transportation paid to a fee-for-service transportation provider, not to exceed ten percent (10%) of the total ESA awarded to the participating student per school year;

(6) Tuition or fees for a nonpublic online learning program or course;

(7) Fees for:

(A) Nationally standardized norm-referenced achievement tests;

(B) Advanced Placement examinations;

(C) State-recognized industry certification or credential; or

(D) Examinations related to college or university admission;

(8) Contributions to a Coverdell education savings account established under 26 U.S.C. § 530 for the benefit of the participating student, except that funds used for elementary or secondary education expenses shall be for expenses otherwise allowed under this section;

(9) Educational therapies or services for participating students from a licensed or accredited practitioner or provider, including licensed or accredited educational aides and assistants;

(10) Services provided under a contract with a public school, including individual classes and extracurricular programs;

(11) Tuition or fees at an eligible postsecondary institution;

(12) Textbooks required for courses at an eligible postsecondary institution;

(13) Bank or account custodian fees for the management of the ESA; or

(14) Computer hardware or other technological devices approved by the department or a physician, if the computer hardware or other technological device is used for the student's educational needs.

(c) Only the department may deposit funds into an ESA. However, nothing in this part shall prohibit parents or third parties on a parent's behalf from making payments for the costs of educational programs and services not covered by the funds in the ESA.

(d)

(1) A parent shall ensure that the participating student is annually administered either a nationally norm-referenced test identified by the department or the Tennessee comprehensive assessment program (TCAP) tests or any future replacements of the TCAP tests. The tests should, at a minimum, measure learning in mathematics and English language arts. Results of the testing shall be reported to the parent. Students with disabilities for whom standardized testing is not appropriate, as determined on the student's IEP, are exempt from this requirement. For participating students enrolled fulltime in a participating school, the school is responsible for annually administering the test to these students, and the test must be permitted by the participating school's appropriate accrediting agency as approved by the department of education. The department shall establish a process for all other participating students to take the state achievement test or an approved nationally norm-referenced test of their parents' choice.

(2) Notwithstanding § 10-7-504(a)(4); the Data Accessibility, Transparency and Accountability Act, compiled in chapter 1, part 7 of this title; or

the Family Educational and Privacy Rights Act, as provided by 20 U.S.C. § 1232g, the department shall ensure that:

(A) The results of the tests administered pursuant to subdivision (d)(1) are provided to the department or an organization chosen by the department on an annual basis, beginning with the first year of testing;

(B) The student information is reported in a way that will allow the state to aggregate data by grade level, gender, family income level, race, and category that makes the participating student eligible for an ESA pursuant to § 49-1-1202(4); and

(C) The state or an organization chosen by the state will be informed of the participating student's graduation from high school.

(3) Notwithstanding § 10-7-504(a)(4); the Data Accessibility, Transparency and Accountability Act; or the Family Educational and Privacy Rights Act, as provided by 20 U.S.C. § 1232g, the department, or an organization chosen by the department, shall annually produce and publish a report, in compliance with all state and federal privacy laws, to be made available on the department's website. Report findings shall be aggregated by the students' grade level, gender, family income level, number of years of participation in the program, race, and category that makes the participating student eligible for an ESA pursuant to § 49-1-1202(4). The report shall include:

(A) Student performance on state achievement tests or nationally norm-referenced tests, including learning gains;

(B) High school graduation rates;

(C) Parental survey findings in accordance with subdivision (d)(6);

(D) The percentage of funds used for each qualifying expense;

(E) The fiscal impact to the state and resident school districts of the program, including the impact on revenue and the impact on expenses; and

(F) A report on the fiscal savings associated with students departing public schools, regardless of whether a public school from which a student would have attended reduces its spending accordingly.

(4) In creating the report required by subdivision (d)(3), the department shall:

(A) Apply appropriate analytical behavioral science methodologies to ensure public confidence in the study; and

(B) Protect the identity of participating students including keeping all disaggregated data anonymous.

(5) The department shall provide the chair of the senate education committee, the chair of the house of representatives education administration and planning committee, and the chair of the house of representatives education instruction and programs committee with a final copy of the report required by subdivision (d)(3).

(6) The department shall survey all parents of participating students, to be included in the report pursuant to subdivision (d)(3)(C), inquiring into:

(A) Satisfaction with the program;

(B) Whether an agreement with an ESA provider was terminated and why;

(C) Opinions on other topics, items, or issues that the department finds would elicit information about the effectiveness of the ESA program; and

(D) The number of years the parent's child participated in the program.

(e) A participating student enrolled in the program shall forfeit program eligibility and further access to the student's ESA account if the student enrolls in a public school, graduates from high school, or reaches twenty-two (22) years of age by August 15 for the next school year, whichever occurs first.

(f) Notwithstanding subdivision (a)(2), a participating student may return to the student's LEA at any time after enrolling in the program in compliance with rules promulgated by the state board of education. The state board of education shall promulgate rules providing the least disruptive process for the return of a participating student to the student's LEA. Upon a participating student's return to the student's LEA, the student's ESA shall be closed, and any remaining funds shall be returned to the state treasurer to be placed in the basic education program (BEP) account of the education trust fund of 1992 under §§ 49-3-357 and 49-3-358.

(g) If a participating student is no longer a permanent resident of Tennessee, the student's ESA shall be closed, and any remaining funds shall be returned to the state treasurer to be placed in the basic education program (BEP) account of the education trust fund of 1992 under §§ 49-3-357 and 49-3-358.

(h) Any funds remaining in a student's ESA upon graduation from high school may be used to attend or take courses from an eligible postsecondary institution, with qualifying expenses subject to the applicable conditions of subsection (b).

(i) Upon a participating student's graduation from a postsecondary institution or after any period of four (4) consecutive years after high school graduation in which the student is not enrolled in an eligible postsecondary institution, the participating student's ESA shall be closed, and any remaining funds shall be returned to the state treasurer to

be placed in the basic education program (BEP) account of the education trust fund of 1992 under §§ 49-3-357 and 49-3-358.

(j) Funds received pursuant to this part do not constitute income taxable to the parent of the participating student or to the student under title 67, chapter 2.

(k) No more than fifty percent (50%) of a participating student's total annual ESA award may rollover to a subsequent school year.

**49-1-1204.**

(a) A provider shall not refund, rebate, or share funds from an ESA with a parent or participating student in any manner. The funds in an ESA may be used only for educational purposes. Participating schools, eligible postsecondary institutions, and providers that enroll participating students shall provide parents with a receipt for all qualifying expenses at the school or institution. The department shall promulgate rules for how refunds should be returned to the account.

(b) To ensure that students are treated fairly and kept safe, all participating schools shall:

(1) Comply with all health and safety laws or codes that apply to nonpublic schools;

(2) Certify that the school will not discriminate against students or applicants on the basis of race, color, or national origin;

(3) Comply with § 49-5-202; and

(4) Conduct criminal background checks on employees, excluding from employment any person not permitted by state law to work in a nonpublic school and any person who might reasonably pose a threat to the safety of students.

(c) The department may suspend or terminate a school from participating in the program if the department determines the school has failed to comply with the

requirements of this section. If the department suspends or terminates a school's participation, the department shall notify affected participating students and parents of the decision. If a participating school is suspended, terminated, or withdraws from the program, affected participating students shall remain eligible to participate in the program until a disqualifying event occurs pursuant to § 49-1-1203(e).

(d)

(1) All ESAs shall be subject to random and quarterly audits as needed by the comptroller of the treasury. With prior approval of the comptroller of the treasury, the audit may be performed by a licensed independent public accountant selected by the department. If an independent public accountant is employed, the audit contract between the department and the independent accountant shall be on contract forms prescribed by the comptroller of the treasury. The cost of any audit shall be paid by the department.

(2) The department may remove any participating student from eligibility for an ESA for failure to comply with the terms of the contract or applicable laws, rules, or orders, or if the student or student's parent knowingly misuses monies or knowingly fails to comply with the terms of the contract with intent to defraud. The department shall notify the parent or guardian of the participating student in writing that the ESA has been suspended and that no further transactions will be allowed or disbursements made. The department shall attempt to notify the parent or guardian of the participating student by phone or email. The notification shall specify the reason for the suspension and state that the participating student has twenty-one (21) business days to respond and take corrective action. If the parent or participating student refuses or fails to contact the department, furnish any information, or make any report that may be required

for reinstatement within the twenty-one-day period, the department may remove the parent or qualified student from the program.

**40-1-1205.**

(a) In administering the program, the department shall:

(1) Remit funds to a participating student's ESA account on a quarterly basis. Any funds awarded under this part shall be the entitlement of only the participating student under the supervision of the student's parent. The annual amount to which a participating student is entitled under this part shall be equal to the amount representing the per pupil state and local funds generated and required through the basic education program (BEP) for the LEA in which the student resides and is zoned to attend.

(2)

(A) Create a standard form that a parent of a student may submit to establish the student's eligibility for an ESA. The department shall make the application readily available to interested families through various sources, including the department's website; and

(B) In accordance with state board of education rules promulgated in consultation with the department of education and the department of health, create an application and approval process for nonpublic schools and providers to become participating schools and providers;

(3) Establish annual enrollment periods for parents to apply for the program. If during any enrollment period the department receives more applications for students than is permitted under § 49-1-1207, the department

shall admit students into the program through a random selection process, with preference granted to the following:

(A) Children who have a parent who is a member of the armed forces of the United States and who is on active duty or was killed in the line of duty;

(B) Foster children who have achieved permanency through adoption or permanent guardianship, or who are residing with a prospective permanent placement and the case plan is adoption or permanent guardianship; or

(C) Children who are members of a household whose annual income during the year prior to initial enrollment in the program met the requirements for free or reduced price lunch under 42 U.S.C. § 1751 et seq., and who reside in an LEA with at least one (1) school in the bottom five percent (5%) of schools in overall achievement as determined by the performance standards and other criteria set by the state board;

(4) Provide parents of participating students with a written explanation of the allowable uses of an ESA, the responsibilities of parents, and the duties of the department;

(5) Ensure that lower-income families are made aware of the program and eligibility requirements;

(6) Adopt policies necessary for the administration of the ESA program, including policies for:

(A) Conducting or contracting for random, quarterly, and annual reviews of accounts;

(B) Establishing or contracting for the establishment of an online anonymous fraud reporting service; and

(C) Establishing an anonymous telephone hotline for reporting fraud; and

(7) Post on its website a list of participating schools for each school year, the grades taught in the school, and other information that the department determines shall assist parents in selecting a participating school.

(b) The department may deduct the lesser of the actual annual cost to administer the program or an amount up to four percent (4%) from appropriations used to fund ESAs to cover the cost of overseeing the funds and administering the program.

(c) In compliance with all state and federal student privacy laws, an LEA shall provide a participating school that has admitted a participating student under this part with a complete copy of the student's school records in the possession of the LEA.

(d) The department of education may contract with one (1) or more nonprofit organizations to administer some or all portions of this program.

**40-1-1206.**

(a) A participating school is autonomous and is not an agent of the state or federal government.

(b) Neither the department nor any other state agency may regulate in any way the educational program of a participating school or education provider that accepts funds from the parent of a participating student.

(c) The creation of the ESA program does not expand the regulatory authority of the state or any agent thereof to impose any additional regulation on nonpublic schools or education providers beyond those necessary to enforce the requirements of the program.

(d) Participating schools and providers shall have the maximum freedom to provide for the educational needs of students without governmental control. Neither a participating school nor a provider shall be required to alter its creed, practices, admissions policies, or curriculum in order to accept participating students.

(e) In any legal proceeding challenging the application of this part to a participating school, the state bears the burden of establishing that the law is necessary and does not impose any undue burden on the participating school.

**49-1-1207.**

Beginning in the 2018-2019 school year, enrollment in the program shall be limited to the equivalent of one-half of one percent (0.5%) of the estimated statewide total public school enrollment in the prior school year. New enrollment shall increase by an additional one-half of one percent (0.5%) of the statewide enrollment each school year thereafter. If there are more applicants than ESAs available due to this section, the department shall award ESAs on a random lottery basis pursuant to § 49-1-1205(a)(3).

**49-1-1208.**

Students eligible for both an ESA under this part and an individualized education account under the Individualized Account Act, compiled in chapter 10, part 14 of this title, may apply for both an ESA and an IEA, if applicable, but may only receive assistance from one (1) program.

SECTION 2. The executive director of the state board of education is authorized to promulgate rules to effectuate the purposes of this act. The rules shall be promulgated in accordance with the Uniform Administrative Procedures Act, compiled in Title 4, Chapter 5.

SECTION 3. If any provision of this part or its application to any person or circumstance is held invalid, then the invalidity shall not affect other provisions or applications of the act that

can be given effect without the invalid provision or application, and to that end the provisions of this act shall be severable.

SECTION 4. If any part of this act is challenged in a Tennessee state court as violating either the state or federal constitutions, parents of eligible or participating students shall be permitted to intervene in such lawsuit for the purposes of defending the act's constitutionality. However, for the purposes of judicial administration, a court may limit the number of parents permitted to intervene or require that all parents file a joint brief, so long as they are not required to join any brief filed on behalf of any named state defendant.

SECTION 5. For the purposes of promulgating rules, this act shall take effect upon becoming a law, the public welfare requiring it. For all other purposes, this act shall take effect July 1, 2017, the public welfare requiring it.